

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARY COLLEEN WEILAND,

Plaintiff,

v.

MICHAEL J. SCULLY, M.D., and
JANE DOE SCULLY, his wife;
BROOKS WATSON II, M.D., and
JANE DOE WATSON, his wife;
KENNEWICK PUBLIC
HOSPITAL DISTRICT, d/b/a
KENNEWICK GENERAL
HOSPITAL, a municipal
corporation; KADLEC MEDICAL
CENTER, a nonprofit Washington
corporation,

Defendants.

NO. CV-07-5042-RHW

**ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS, OR IN THE
ALTERNATIVE TO STAY**

Before the Court is the Defendants Kennewick General Hospital and Michael J. Scully, M.D. and Jane Doe Scully's Motion to Dismiss or in the Alternative to Stay Plaintiff's action (Ct. Rec. 36). Also before the Court are Defendants Brooks Watson, II, M.D. and Jane Doe Watson's Joinder in Motion to Dismiss (Ct. Rec. 43), and Defendant Kadlec Medial Center's Joinder in Motion to Dismiss or in the Alternative to Stay (Ct. Rec. 42). These motions were heard without oral argument.

BACKGROUND

Plaintiff Mary Colleen Weiland contends that Defendants committed medical malpractice through a series of negligent acts by creating a pathway between Plaintiff's rectal and vaginal tracts. Plaintiff brings her state law based

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1 medical malpractice suit against Defendants alleging that this Court has diversity
2 jurisdiction under 28 U.S.C. § 1332. Defendants neither admit nor deny diversity
3 of citizenship.

4 DISCUSSION

5 Defendants filed a Federal Rule of Civil Procedure 12(b)(1) motion asserting
6 Plaintiff's complaint should be dismissed as it:

7 (1) fails for lack of subject matter jurisdiction under 28 U.S.C. § 1332
8 because Plaintiff in her pleading stated that the parties are "residents" of different
9 states instead of "citizens" of different states; and

10 (2)(a) fails because Plaintiff's case presents countervailing factors against
11 the exercise of federal jurisdiction under the *Colorado River* doctrine, and (b) fails
12 because Plaintiff is pursuing an identical action separately and simultaneously in
13 state court.

14 **I. Lack of Subject Matter Jurisdiction by Plaintiff's incorrect use of** 15 **"residents" and inconsistent use of "citizens."**

16 Defendants Scullys, Watsons, Kennewick, and Kadlec move for a dismissal
17 due to Plaintiff's failure to state in her pleading the existence of complete diversity.

18 **A. Standard of Review**

19 When considering a motion to dismiss for lack of subject matter jurisdiction
20 under Rule 12(b)(1), a district court "is not restricted to the face of the pleadings,
21 but may review any evidence, such as affidavits and testimony, to resolve factual
22 disputes concerning the existence of jurisdiction." *Fed. Deposit Ins. Corp. v.*
23 *Nichols*, 885 F.2d 633, 635 (9th Cir.1989) (quoting *McCarthy v. United States*, 850
24 F.2d 558, 560 (9th Cir.1988)).

25 **B. Analysis**

26 Defendants argue that Plaintiff has not "affirmatively and distinctly" pled
27 that Defendants are in fact citizens of different states from Plaintiff. They
28 reference the amended complaint (Ct. Rec. 26 at 1-2) where Plaintiff uses the word

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1 “residents” instead of “citizens.”

2 Plaintiff responds to Defendants’ argument by pointing to paragraph V of
3 her complaint (paragraph VI of her second amended complaint), which states
4 federal jurisdiction exists by diversity of citizenship with a suit between a “citizen”
5 of Oregon and “citizens” of the state of Washington and corporations or entities
6 with their principal place of business in the State of Washington.¹

7 The Court finds that Plaintiff has properly plead diversity jurisdiction. First,
8 Plaintiff does claim diversity jurisdiction in her complaint and properly uses the
9 word “citizen” (Ct. Rec. 48 at 1-2). By properly using the word “citizen” in the
10 part of her complaint alleging jurisdiction Plaintiff has met her burden.²

11 Consequently, the Court denies Defendants’ Motion to Dismiss on the
12 grounds that Plaintiff’s amended complaint does meet the requirements of subject
13 matter jurisdiction.

14 **II(a). Plaintiff’s action presents countervailing factors against the exercise of**
15 **federal jurisdiction and should be dismissed or stayed under the *Colorado***
16 ***River* doctrine.**

17 Plaintiff filed twin actions in Benton County and in this Court to protect
18 herself from having her state claim barred by the running of the statute of
19 limitations if it should later be determined that the Federal District Court is without
20 diversity jurisdiction. Defendants neither challenge nor admit diversity

21
22 ¹The complaint also states that the amount in controversy substantially
23 exceeds the \$75,000 requirement.

24 ²If a district court may review any evidence to resolve factual disputes
25 concerning the existence of jurisdiction, including beyond the face of the
26 pleadings, it also has the authority to resolve factual disputes within the pleadings.
27 *See Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996).

jurisdiction, but instead state that this Court may abstain from the exercise of subject matter jurisdiction under the *Colorado River* doctrine. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

A. Standard of Review

The Supreme Court has stated that a federal court with subject matter jurisdiction may abstain under the *Colorado River* doctrine due to principles “of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.” *Id.* at 817. However, “the circumstances permitting the dismissal are considerably more limited than the circumstances appropriate for abstention.”³ *Id.* at 818. The general rule is to exercise federal jurisdiction when it exists:

[The] task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist “exceptional” circumstances, the “clearest of justifications,” that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 26 (1983) (alteration in original). In fact, “the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them” even when the action is pending in state court. *Id.* at 15.

This “unflagging obligation” applies to both dismissals and stays. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912 (9th Cir. 1993) (“[o]nly exceptional circumstances justify such a stay”). The Supreme Court and the Ninth Circuit have articulated a balance test of seven non-exclusive factors to be used in determining when to abstain under this doctrine. *Holder v. Holder*, 305 F.3d 854,

³ The Supreme Court states here that the *Colorado River* doctrine is technically not part of the abstention doctrine (e.g. *Pullman*, *Younger*, *Burford* abstention), and the doctrine is much narrower than the abstention doctrine. *See Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989).

1 869 (9th Cir. 2002). The factors are as follows:

- 2 (1) whether the state court first assumed jurisdiction over property;
- 3 (2) inconvenience of the federal forum;
- 4 (3) the desirability of avoiding piecemeal litigation;
- 5 (4) the order in which jurisdiction was obtained by the concurrent forums;
- 6 (5) whether federal law or state law provides the rule of decision on the merits;
- 7 (6) whether the state court proceedings are inadequate to protect the federal litigant's rights;
- 8 (7) whether exercising jurisdiction would promote forum shopping.

9 *Id.*

10 **B. Analysis**

11 Defendants concede that factors 1, 2, and 7 are not relevant to the current
12 case. They instead focus on factors 3, 4, 5, and 6. Regarding factor 4, the order in
13 which jurisdiction was obtained, Defendants reference *Cone*: “priority should not
14 be measured exclusively by which complaint was filed first, but rather in terms of
15 how much progress has been made in the two actions.” 460 U.S. at 21. Defendants
16 argue that because the state court proceedings are running ahead (court has already
17 issued its litigation scheduling order and currently has a motion to dismiss before
18 it), factor 4 weighs in favor of abstention.

19 Plaintiff responds by pointing out that in this case both the federal and state
20 cases were filed the same day. Additionally, the litigation schedule that
21 Defendants use as evidence of progress is nothing more than the result of a state
22 court rule that requires a scheduling order be issued at the start of every case.
23 Benton-Franklin County Superior Court rule LCR 4(a).

24 The Court is not persuaded by Defendants’ argument and can find no case
25 law to support the idea that factor 4 weighs in favor of abstention by such
26 “progress” in state court. “The mere existence of a case on the state docket in no
27 way causes a substantial waste of judicial resources nor imposes a burden on the
28 defendant which would justify abstention.” *Herrington v. County of Sonoma*, 706
F.2d 938, 940 (9th Cir. 1983). Because the two cases were filed on the same day

1 and there has been no real progress in state court, factor 4 is irrelevant to the case
2 at hand.

3 Defendants also focus on factor 3, the desirability of avoiding piecemeal
4 litigation, together with factor 5, controlling law, in favoring abstention. They
5 point out that Plaintiff's case is based exclusively on state law. They also contend
6 that the case requires the application of RCW 7.70.100,⁴ for which there is no
7 body of state appellate law. They surmise that if this Court does not abstain from
8 the exercise of jurisdiction it will find itself in needless and wasteful piecemeal
9 litigation and procedural delay by having to possibly certify statutory interpretation
10 issues to the State Supreme Court.⁵

11 Plaintiff responds that the lack of interpretation of RCW 7.70.100 is no
12 reason to surrender federal jurisdiction. She makes two arguments on this point.
13 First, the statute was amended less than two weeks after Plaintiff filed her pre-
14 claim notice.⁶ Second, the statute can be understood on its face.

15 The Court is not persuaded by Defendants' factor 3 (piecemeal litigation)

16
17 ⁴ RCW 7.70.100 reads in part:

18 No action based upon a health care provider's professional negligence
19 may be commenced unless the defendant has been given at least
ninety days' notice of the intention to commence the action.

20 It is the Defendants' position that one Defendant was not given the required notice
21 by Plaintiff.

22 ⁵ Defendants also argue that under the surface of RCW 7.70.100 there is a
23 statute-of-limitation challenge and a connected consideration of a mandatory
24 mediation of health care claims under Washington Rules for Superior Court, CR
25 53.4, for which there is no corresponding rule under the Fed. R. Civ. P. 53.

26 ⁶ Plaintiff does not explain this argument, but the Court assumes that her
27 position is that with a defunct statute there is less of a need to have it interpreted by
28 the State Supreme Court.

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1 arguments. “Piecemeal litigation occurs when different tribunals consider the same
2 issue, thereby duplicating efforts and possibly reaching different results.” *Am. Int’l*
3 *Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988).
4 Unlike *Colorado River*, where important real property rights were at stake and
5 where there was a substantial danger of inconsistent judgments, the present case
6 appears to involve fairly ordinary tort issues. *See Travelers Indem. Corp. v.*
7 *Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990). Most significantly, the state court
8 has made no judgments because the Plaintiff has intended to drop the state court
9 action once diversity is assured.

10 Additionally, Defendants’ argument that controlling state law is so
11 complicated that this Court should abstain from its exercise of jurisdiction is not
12 compelling. Factor 5 (controlling law) has little weight in this case because the tort
13 is based on state law. “[T]he presence of federal-law issues must always be a
14 major consideration weighing against surrender.” *Cone*, 460 U.S. at 26. “However,
15 where state law issues predominate, the source of law [factor] is of diminished
16 importance.” *Cerit v. Cerit*, 188 F. Supp. 2d 1239 (D. Haw. 2002); *see also Am.*
17 *Bankers Ins. Co. v. First State Ins. Co.*, 891 F.2d 882, 886 (11th Cir. 1990)
18 (“Although only state law will govern all of the claims in this lawsuit, the Court
19 does not weigh that factor heavily against the exercise of its diversity
20 jurisdiction.”).

21 Finally, Defendants argue that factor 6 (whether state court can adequately
22 protect the right of the parties) also favors abstention. They argue that because the
23 case is based on state law the state courts are more than capable of adjudicating the
24 claim. Plaintiff responds that the federal forum provides them with benefits
25 unavailable in the state court (*e.g.* less chance of biased jurors with knowledge of
26 Defendants, limitations on expert testimony, and limitations on non-deposition
27 discovery).

28 When considering factor 6, a court is required to conclude that “parallel

1 state-court litigation will be an adequate vehicle for the complete and prompt
2 resolution of the issues between the parties,” and “that the federal court will have
3 nothing further to do in resolving any substantive part of the case.” *Intel Corp.*, 12
4 F.3d at 912. As the current case is based exclusively on state law, factor 6 does
5 appear to weigh in the Defendants’ favor.

6 Considering all factors together, a dismissal or stay under *Colorado River* is
7 inappropriate. Factors 1, 2, and 7 are admittedly irrelevant. Factor 4, order of
8 jurisdiction, does not weigh in favor of abstention. Factor 3, piecemeal litigation,
9 does not appear to support abstention. Factor 5, controlling law, is not a weighted
10 factor when it is a state law claim. Factor 6, whether state court can adequately
11 protect the rights of the parties, appears to be the significant factor weighing in
12 favor or abstention. In totality the factors in favor of abstention do not rise to the
13 “exceptional circumstances” requirement. *Intel Corp. v. Advanced Micro Devices,*
14 *Inc.*, 12 F.3d at 912. If this Court were to grant abstention by mainly relying on
15 factor 6 (whether state court can adequately protect the right of the parties), it
16 would be stretching *Colorado River* to the point of eliminating the future of
17 diversity jurisdiction.

18 Consequently, this Court denies Defendants’ Motion to Dismiss or in the
19 Alternative Stay (Ct. Rec. 36) on the grounds that the case does not meet the
20 exceptional circumstances” of *Colorado River* doctrine.

21 **II(b). Plaintiff cannot pursue an identical action separately and**
22 **simultaneously in state court.**

23 Within their *Colorado River* abstention argument, Defendants contend that
24 Plaintiff does not have the right to actively pursue parallel state and federal actions
25 simultaneously. Plaintiff filed actions the same day in both state and federal court
26 because of statute of limitations concerns. Plaintiff has the intention of dismissing
27 the state case if diversity jurisdiction is accepted by this Court.

28 Defendants support their argument that Plaintiff does not have the right to
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1 actively pursue both actions with *Ollie v. Riggin*, 848 F.2d 1016, 1017 (9th Cir.
2 1988). However, as Plaintiff points out, in *Ollie*, the state court ruled against the
3 plaintiff before her case was even heard in Federal Court; by the time the case
4 reached the Ninth Circuit Court of Appeals, the Washington State Court of
5 Appeals had reversed the state trial court and the case was pending at the
6 Washington Supreme Court. *Id.* In contrast, in the present case there have not
7 been any rulings made by the state court. This Court does not find *Ollie* to be on
8 point.

9 Thus, the Court denies Defendants' Motion to Dismiss on the grounds that
10 Plaintiff is not pursuing two actions simultaneously.

11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. Defendants' Motion to Dismiss (Ct. Rec. 36) is **DENIED**.

13 2. Defendants Brooks Watson, II, M.D. and Jane Doe Watson Joinder in
14 Motion to Dismiss (Ct. Rec. 43) is **GRANTED**.

15 3. Defendant Kadlec Medial Center's Joinder in Motion to Dismiss or in the
16 Alternative to Stay (Ct. Rec. 42) is **GRANTED**.

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
18 Order and forward copies to counsel.

19 **DATED** this 19th day of February, 2008.

20 *S/ Robert H. Whaley*

21 ROBERT H. WHALEY
22 Chief United States District Judge
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